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No. 85-656

IN THE

SUPREME COURT

of the

UNITED STATES

OCTOBER TERM, 1985

Secretary of State of the State of Washington,
Ralph Munro,

Appellant,

v.

Socialist Workers Party, ET AL.

Appellees.

ON APPEAL FROM THE UNITED STATES

COURT OF APPEALS FOR THE

NINTH CIRCUIT

APPELLEE'S MOTION TO AFFIRM OR DISMISS

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APPELLEES' MOTION TO AFFIRM OR DISMISS

Appellees move to affirm the judgment of the Court of Appeals on the ground that the question presented is so insubstantial as not to need further argument. Appellees are not aware of any jurisdictional

defects, but the Court should independently examine the record and, if any appears, dismiss the appeal.

QUESTION PRESENTED

Where a new and uniquely restrictive ballot access procedure in practice effectively bars almost all minor party candidates from the statewide general election ballot, has the Court of Appeals correctly held that the State must justify the additional restrictions as necessary to limit the ballot to a reasonable number of serious candidates, or to serve some other substantial state interest?

MOTION TO AFFIRM OR DISMISS

The decision of the Court of Appeals is clearly correct. It was unanimous and unequivocal. No petition for rehearing was filed suggesting that any points of law or fact were overlooked or misapprehended by the Court of Appeals.

No suggestion for a hearing or rehearing en banc was made, either on the basis of maintaining uniformity of the Court's decisions, or on a claim that the case involves a question of exceptional importance.

These omissions by the State were appropriate because this case does not in fact involve a question of exceptional importance--to anyone but the voters of the State of Washington. For no other state has an election law anything like the one at issue here. The federal constitutional interests of the voters and candidates at stake were upheld by the Court of Appeals, following the clear guidance provided by this Court from Williams v. Rhodes, 393 U.S. 23 (1968) to Anderson v. Celebrezze, 460 U.S. 780 (1983). The facts are unique in this case, indeed anomalous. But the legal

principles are well established and not in conflict. There are no novel or substantial questions of federal constitutional law presented. And therefore there is no reason for this Court to give this case further consideration.

STATEMENT OF THE CASE

The Court of Appeals properly handled the task of evaluating the new and uniquely[1] restrictive minor party ballot qualification procedures that had brought about "the virtually complete exclusion of serious-minded[2] minor

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[1]Only one other state has apparently ever had a similar restriction on ballot access, and in that state it was also struck down as unconstitutional as applied. SWP v. Secretary of State, 412 Mich. 571, 317 N.W.2d 1 (1982).

[2]Appellant does not challenge the seriousness of Appellee Dean Peoples' candidacy for the U.S. Senate in the Fall of 1983. He was the legally nominated

parties...."[3] since its 1977 enactment.

The record demonstrated that Washington's pre-existing (and continuing) nominating signature requirement was and is sufficient to successfully protect the integrity of the election process against the danger of voter confusion which might

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[2]cont. candidate of the Socialist Workers Party, which has been a nationally active, serious political party for over forty years. Its candidates have regularly participated in local and national election campaigns in the majority of the states in the union, including Washington. The party's program represents a serious alternative to the platforms of the Democratic and Republican parties, with a point of view not represented by the major parties on issues of economics, foreign policy, and social justice. The Appellees assert that election campaigns represent a major forum to present their views to the American people. Such minor party participation in elections is an essential feature of American democracy. Anderson v. Celebrezze, 460 U.S. 780, at n.17.

[3]Quotation from the findings of the Court of Appeals, reproduced in the Jurisdictional Statement (hereafter "JS") at A-7.

result from the presence on the ballot of too numerous or frivolous candidates. In the 20 prior gubernatorial elections in this century, an average of only 4.75 candidates appeared on each general election ballot, and the trend was actually downward. JS:A-6.[4] And the number of candidates for other offices was substantially less than for governor. Id.

This existing system successfully accomodated the state's interest in running manageable elections, together with "the right of individuals to associate for the advancement of political beliefs" in the electoral arena, "and the right of qualified voters, regardless of their political persuasion, to cast their votes

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[4] Cf. Williams v. Rhodes, 393 U.S. 23, 47 (1968) (Harlan, J., concurring) (Eight candidates not confusing).

effectively." Williams v. Rhodes, 393 U.S. 23, 30 (1968). "An election campaign is a means of disseminating ideas as well as obtaining political office." Illinois State Board of Elections v. SWP, 440 U.S. 173, 186 (1979).

> In short, the primary values protected by the First Amendment---"a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open," New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)--are served when election campaigns are not monopolized by the existing parties.

Anderson v. Celebrezze, 460 U.S. at 794 (1983).

The record here clearly reveals that the new, additional restrictions have almost totally deprived voters of minor party alternatives in statewide races. As compared to the forty minor party candidates who qualified for the five statewide ballots from 1968 to 1976, in the four

elections which followed the 1977 amendments, through 1984, only eight candidates even attempted to qualify, and seven of those were eliminated by the new restrictions. JS: A-4.

The Court of Appeals carefully applied the balancing test spelled out by this Court in numerous cases from Williams v. Rhodes, 393 U.S. 23 (1968), to Storer v. Brown, 415 U.S. 724 (1974) to Anderson v. Celebrezze, 460 U.S. 780 (1983). No new or different principle, other than those clearly set out in the controlling precedents, was necessary to decide this case.

The state articulated no significant interest making the further restriction necessary.[5] Appellant presented no

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[5]Other than the demonstrably unfounded fear of ballot overcrowding, see n.3, above.

evidence of any prior problem, at any time in the 70-plus year history of Washington elections, which required any remedy, let alone the "draconian" impact of the one adopted. Therefore, the Court of Appeals correctly found the imposition of the new second hurdle unjustified, leaving the state in the wholly satisfactory status quo ante, with the preexisting nominating signature requirement continuing to reasonably limit, but not wholly choke off, access to the ballot.

If in the future some substantial problem develops, the state remains free to fashion some remedy tailored to the nature and gravity of the problem. But without such evidence, a virtually total monopoly of the statewide ballot by the two major parties cannot be justified.

NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED BY THE APPELLANT.

Appellant makes a handful of criticisms of the Court of Appeals' decision. Each of them, on examination, is transparently insubstantial, and not well founded in the applicable law or the facts of this case. No conflict is demonstrated with any prior decision of this Court.

First, Appellant complains that the Court of Appeals has evaluated the statute as applied, and has not simply found it unconstitutional on its face. JS: 10. It is ironic that the State should complain about the court's conservative and finely tuned approach in this area of fundamental rights where it is well established that one must work with a scalpel, rather than an axe. Cf. Kusper v. Pontikes, 414 U.S. 51, 59 (1973); Procunier v. Martinez, 416 U.S. 396 (1974).

It was a statewide ballot that Plaintiff-Appellee was excluded from by the new restrictions. The record amply demonstrates that the effect was the same on all statewide races.[6] This disparately harsh restrictive effect cannot be justified by the convenience of the simple uniformity in treating different things in the same way. "Sometimes the grossest discrimination can lie in treating things that are different as though they are exactly alike." Jenness v. Fortson, 403 U.S. 431, 442 (1971).

This Court has made it clear that there can be no "litmus-paper test" for determining whether ballot access laws are

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[6]Appellees did not complain of the effect on local elections. The Complaint specifically alleges: "These amendments have since their adoption effectively barred all minor parties from participating in general elections for state-wide office." ER 1, 1:19-21.

unconstitutional, and that the courts must take a realistic look at the facts. Storer v. Brown, 415 U.S. 724, 730 (1974); Anderson, supra, at 789. The Court's opinions in Storer v. Brown and Mandel v. Bradley, 432 U.S. 173 (1977) had previously made it clear that the historical experience with a ballot access law, as applied,[7] is a key element in

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[7]The appropriate inquiry was set out in Storer v. Brown, supra at 742:

> [I]n the context of [Maryland] politics, could a reasonably diligent independent candidate be expected to satisfy the [ballot access] requirements, or will it be only rarely that the unaffiliated candidate will succeed in getting on the ballot? Past experience will be a helpful, if not always an unerring, guide: it will be one thing if independent candidates have qualified with some regularity and quite a different matter if they have not....

In Storer itself, because the District Court had not applied these standards in adjudicating the constitutional issues

determining its constitutionality. It was just such a factual inquiry the Court of Appeals engaged in here.

Likewise, the only other state which previously added a similar primary vote requirement[8] to the nominating petition requirement saw their statute withstand a facial challenge upon its enactment in Hudler v. Austin, 419 F.Supp. 1002 (ED Mich. 1976). But when several years of experience demonstrated that this second hurdle was so restrictive that it barred all but a few minor party candidates from the general election bal-

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[7] cont. before it, we remanded the case "to permit further findings with respect to the extent of the burden imposed on independent candidates."

Mandel, 432 U.S. at 177-178.

[8]Michigan actually required less than 1/3 the primary vote percentage this case involves--0.3% versus 1%.

lot, going far beyond the justification of reasonable limits on ballot size, the statute was struck down as applied. SWP v. Secretary of State, 412 Mich 571, 317 NW2d 1 (1982). It is not surprising, then, that Appellant cites no authority in support of this aspect of the appeal.

Second, the Appellants argue that instead of a fact-specific balancing test, the court should formulate just the sort of universal "litmus test," based on numbers or percentages, which this Court has explicitly rejected.[9] JS: 12-13. Further, the Appellant's argument here is based on an "apples-oranges" comparison. The assertion is that if a 5% signature requirement (gathered over a 6 month

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[9] Storer, supra, at 730; Anderson at 460 U.S. 789.

period) was approved in Jenness,[10] and a 1% signature requirement (over a 55 day period) was approved in American Party of Texas),[11] then a 1% primary vote requirement must be valid (though it was added to Washington's already existing signature requirement).

This reliance on Jenness and American Party is inapt for a number of reasons. In American Party, as in Jenness, the Court examined the record and found substantial evidence to support the lower court's factual finding that the challenged scheme in practice "in no way freezes the status quo," (Jenness) but rather, in fact, "affords minor political parties a

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[10] Jenness v. Fortson, 403 U.S. 431 (1971).

[11] American Party of Texas v. White, 415 U.S. 676 (1974).

real...opportunity for ballot qualification" (American Party). For example, the record in American Party revealed that the SWP had in fact gathered the number of signatures required in Texas, so was not in a position to complain.[12] In both cases this Court found that the evidence did not support any inference that minor parties were, in practice, substantially barred from the general election ballot. The record here clearly supports the opposite conclusion arrived at by the court below.

In addition, the attempted sleight-of-hand comparison,[13] between our

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[12] The Court granted the SWP's separate claim for the absentee ballot placement Texas had denied to minor parties.

[13] "Yet the court below called Washington's 1% requirement 'more difficult to meet'. App. A-8. Why the 9,140 primary votes called for under Washington's 1% requirement would be more difficult to obtain than the 122,883 called for under Jenness or the 18,890 called for under American Party is baffling." JS at 13.

signature plus vote percentage, and the simple petition signature percentages upheld in some other cases is not a worthy argument. It passes over without explanation the significant difference between a signature and a vote,[14] between a one-step and a two-step qualifying requirement, as well as the other significant differences discussed by the

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[14] Cf. Anderson v. Mills, 664 F.2d 600, 610 (6th Cir. 1981) (Addition of "desire to vote" pledge to signature supporting ballot placement held unconstitutional); Hall v. Austin, 495 F.Supp. 782, 790 n.12 (E.D. Mich. 1980) (Distinction between inappropriate vote-getting requirement and legitimate test of community support for ballot placement); and see Williams v. Rhodes, 393 U.S. 23 (1968), at note 10 (42 out of 50 states had signature-only requirements of 1% or less).

court below. JS: A-8.

The Appellant goes on to misstate the nature of the adverse impact of the "relatively early deadlines" criticized by the Court of Appeals. JS 13. The effect of the Washington system is to require independents and minor parties tc select and qualify their candidates on the Saturday prior to the last Monday in July. RCW 29.24.020. This is long before the September primaries,[15] and before the major party candidates have even declared for the primary. RCW 29.18.025.

Those candidates already selected and qualified must then, in September, face

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[15] Contrary to the Appellant's claim at JS: 13, the September primary can only eliminate minor party and independent nominees who qualified in July. It is not a second opportunity for any new minor party or independent candidates to qualify for the ballot after the July nomination signature deadline.

elimination at a stage before the "major parties [have] staked out their positions and selected their nominees...." Anderson, 460 U.S. at 792. This elimination takes place by inserting the name of the minor party's single already--nominated candidate, without explanation, into the mechanism by which the major parties select which one of the many contenders will be nominated to represent them in the general election. "The purpose of a primary election is to narrow the field of candidates to one per party in order that the general electicn might be reserved for major struggles, not intraparty feuds." Cross v. Fong Eu, 430 F.Supp. 1036, 1038 n.2 (N.D. Ca. 1977), citing Storer v. Brown, 415 U.S. 724, 735 (1974).

The system of requiring the minor parties and independents to select and

qualify candidates one step ahead of the major parties significantly burdens ballot access. Tucker v. Salera, 424 U.S. 959 (1976), aff'g 399 F.Supp. 1258 (E.D. Pa. 1975). Cf. Mandel v. Bradley, 432 U.S. 173, 177 (1977). Absent a substantial justification, such a burden cannot stand. It was precisely this principle that led to the holding of Anderson v. Celebrezze, that "the 'extent and nature' of the burdens Ohio has placed on the voters freedcm of choice and freedom of association [by the relatively early deadlines alone] unquestionably outweigh the state's minimal interest...." 460 U.S. at 806.

Finally, with regard to the appellants' many claims as to the "advantages" minor parties enjoy under Washington's "blanket primary," the Court of Appeals gave the appropriately simple response:

"These advantages are insubstan-

tial in the face of the undisputed evidence that the revision as a whole substantially forecloses minor parties from the general election ballot. Moreover, the state does not argue the benefits it extols could not be achieved by less restrictive means."

JS: A-5.

CONCLUSION

The failure of the state to offer or prove any justification for the effective elimination of minor parties from the statewide ballot left the court below with no choice but to find the challenged new additional restrictions unconstitutional as applied to Plaintiffs--Appellees and others similarly situated. This appeal presents no substantial federal constitutional questions, and this

Court should affirm without further argument.

DATED: December 15, 1985.

Respectfully submitted,

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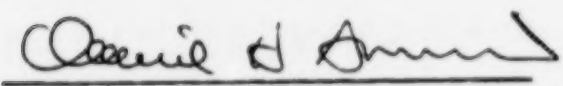

Daniel Hoyt Smith